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Patrick Turner
Attorney

May 1, 2000

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37245

Re: *Tariff Filing of BellSouth Telecommunications, Inc. to Reduce
Grouping Rates in Rate Group 5 and to Implement a 3% Late Payment
Charge*
Docket No. 00-00041

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Statement Regarding Its Motion to Compel. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Patrick W. Turner

PWT/jem

Enclosure



**BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE**

CONSUMER ADVOCATE DIVISION)	
)	Docket No. 00-00041
vs.)	
)	Tariff 00-00041
BELLSOUTH TELECOMMUNICATIONS,)	
INC.)	

**BELLSOUTH TELECOMMUNICATIONS, INC.'s
STATEMENT REGARDING ITS MOTION TO COMPEL**

The Motion to Compel filed by BellSouth Telecommunications, Inc. ("BellSouth") in this Docket is much more of a shield than a sword. As explained below, BellSouth maintains that the attempts by the Consumer Advocate Division ("CAD") to inject irrelevant rate base, rate-of-return regulatory principles into this price regulation docket are simply improper. To the extent that the CAD may be allowed to inject these archaic principles into this docket, however, BellSouth is entitled to discover information regarding the CAD's attack on BellSouth's tariff in order to defend itself against that attack.

I. THE CAD'S MOTION TO COMPEL SHOULD BE DENIED TO THE EXTENT THAT IT SEEKS INFORMATION RELATED TO IRRELEVANT RATE BASE, RATE-OF-RETURN PRINCIPLES.

As reflected by the approved issues list, this Docket involves issues that are legal in nature. The CAD, however, bases its attacks on BellSouth's tariff on rate base, rate-of-return regulatory principles that are simply irrelevant as a matter of fact and as a matter of law. Far beyond merely attempting to conduct an improper fishing expedition, the CAD's Data Requests attempt to conduct an even more

improper archaeological expedition in search of the fossils of regulatory concepts that died long ago. BellSouth, therefore, submits that the Hearing Officer should deny the CAD's Motion to Compel, deny BellSouth's Motion to Compel, and prohibit the parties from using any document during the hearing that is responsive to a Data Request and that has not been produced. To the extent that the CAD's Motion to Compel is granted, however, the CAD should be required to provide the same level of Responses to BellSouth's Data Requests, which seek information that purportedly supports the CAD's attack on BellSouth's tariff.

A. The Rules of Discovery Do Not Permit Burdensome Fishing Expeditions.

While the scope of discovery is broad, it "is not unlimited." *Steinkerchner v. Provident Life & Accident Ins. Co.*, 1999 WL 734545 (Tenn. Ct. App. September 22, 1999)(copy attached). In *Steinkerchner*, the Plaintiff alleged bad faith denial of an insurance claim and asked an interrogatory that is similar in breadth and scope to many of the CAD's Data Requests in this Docket:

Identify by name, address, telephone number and policy number each and every Tennessee resident to whom Provident Life and Accident Insurance Company had issued a job disability policy, upon which a claim for disability benefits has been made and subsequently denied in whole or in part by the Defendant Provident Life and Accident Insurance Company during the period of time after January 1, 1996.

Id. at *1. The trial court ordered the Defendant to respond to this interrogatory, and it denied two motions by the Defendant for an interlocutory appeal. Finally, the Tennessee Court of Appeals granted the Defendant's application for extraordinary appeal and reversed the trial court's order.

In doing so, the Tennessee Court of Appeals first noted that "the scope of discovery, while broad, is not unlimited." *Id.* at *2. The Court then stated that

Mere incantations that an opponent has acted in bad faith will not convert a simple contract lawsuit into a license to burden or harass one's adversary. Conclusory claims of bad faith may not be the basis for conducting marginally relevant discovery which is by its nature burdensome. Such discovery requests amount to nothing more than an out and out fishing expedition.

Id. at *2. The Court noted that the issues in that case were limited to the Plaintiff's claim for insurance benefits and the adequacy of the Defendant's reasons for denying the claim, and it concluded that "[the Defendant's] conduct regarding the unique insurance claims of others is not relevant to whether it properly handled the claim at issue." *Id.* at *3.

This Tennessee decision is consistent with decisions from numerous other jurisdictions that have rejected a party's attempts to conduct broad "fishing expeditions." In *In Re ML-Lee Acquisition Fund*, 151 F.R.D. 37, 41 (S.D. Del. 1992), for instance, the Court refused discovery of potential investments that were considered by a fund but not actually made, stating

the Court finds that plaintiffs' requests for documents related to all investments considered but not made are in the nature of a fishing expedition of marginal relevance when weighed against the significant burden on the defendants in producing those documents.

Accord Hoffer v. Mack Trucks, Inc., 981 F.2d 377, 380 (8th Cir. 1993)("While the standard of relevance in the context of discovery is broader than in the context of admissibility . . . , this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery."); *Piacenti v. General*

Motors Corp., 173 F.R.D. 221, 224 (N.D. Ill. 1997) ("The legal tenet that relevancy in the discovery context is broader than in the context of admissibility should not be misapplied so as to allow fishing expeditions in discovery.").

B. The CAD's Attempts to Fish for Information Regarding Antiquated Rate Base, Rate-of-Return Principles is Particularly Inappropriate in Light of the Fact that BellSouth is Operating Under an Approved Price Regulation Plan.

Despite the CAD's continuing refusal to accept the obvious, *see* CAD's Response to Data Request No. 9,¹ the simple fact remains that BellSouth is operating under an approved price regulation plan. *See* December 19, 1998 Order in Docket No. 95-02614 at 21 ("BellSouth's application for a price regulation plan with an effective date of October 1, 1995 with the rates existing on June 6, 1995, is hereby approved."). BellSouth's rates on the effective date of its plan, therefore, are affordable² as a matter of law. *See* T.C.A. §65-5-209(a). Moreover, BellSouth's rates continue to be affordable -- and, therefore, just and reasonable --

¹ In response to BellSouth's request to admit that BellSouth is operating pursuant to an approved price regulation plan, the CAD states "Denied. There is no articulable (sic) plan. The Consumer Advocate Division contends that the 'plan' is ultra vires, unlawful, and voidable. The Consumer Advocate Division admits that the Tennessee Regulatory Authority through a December 9, 1998 Order purports to have approved BellSouth's application retroactively to 1995 in contravention of the 1995 Tennessee Public Acts, chapter 305 and Tenn. Admin. Rule 1220-4-2-.55(1)(e)." The Court of Appeals, of course, disagrees with the CAD's view of that Order. *See Consumer Advocate Division v. Tennessee Reg. Auth.*, 2000 WL 13794 (Tenn. Ct. App. January 10, 2000) (copy attached) (affirming the TRA's Order approving BellSouth's application for a price regulation plan).

² Because these rates are affordable, they are also just and reasonable. *See* T.C.A. §65-5-209(a) ("Rates for telecommunications services are just and reasonable when they are determined to be affordable as set forth in this section.").

as long as they generate aggregate revenues that "do not exceed the aggregate revenues generated by the maximum rates permitted by the price regulation plan." T.C.A. §65-5-209(e). The CAD's attempt to delve into the manner in which a particular rate was established in bygone years, therefore, is neither relevant nor permissible. *See BellSouth Telecom., Inc. v. Greer*, 972 S.W.2d 663, 681-82 (Tenn. Ct. App. 1997)(summarily rejecting AT&T's argument that in auditing BellSouth's 3.01 report under T.C.A. §65-5-209(c) and (j), the Public Service Commission "did not complete its task because it failed to review each of BellSouth's rates and tariffs to determine whether they were affordable and non-discriminatory.").

C. In Attempting to Conduct Discovery Regarding Rate Base, Rate-of-Return Regulation, the CAD is Attempting to Conduct an Investigation that the Public Service Commission Itself was Prohibited from Conducting.

In light of the above, the CAD's attempts to resurrect anachronistic and arcane rate-of-return concepts and apply them to BellSouth (which is operating under an approved price regulation plan) are simply improper. In fact, the Court of Appeals ordered the Public Service Commission to cease an earnings investigation regarding BellSouth for this very reason. In *BellSouth Telecommunications, Inc. v. Bissel*, 1996 WL 557846 (Tenn. Ct. App. October 2, 1996)(copy attached), the Public Service Commission decided to continue an "earnings investigation" regarding BellSouth despite the fact that BellSouth already had applied for price regulation. In summarily reversing this decision, the Court of Appeals first noted

that the price regulation statutes "created an alternative to the traditional method of establishing consumer telephone rates by future rate-of-return analysis." *Id* at *1.

The Court then said

We think the PSC's decision to continue the investigation is simply arbitrary, a decision "that is not based on any course of reasoning or exercise of judgment."

* * *

We are aware that in adopting regulatory reform the legislature was careful to say that nothing in the act would "affect the authority and duty of the Commission to complete any investigation pending at the time" the act became effective. We do not think the legislature intended to authorize the PSC to continue an investigation that no longer had any purpose.

Id. at *2 (emphasis added).

If the price regulation statutes barred the Public Service Commission itself from continuing a pre-existing earnings investigation prior to the approval of BellSouth's price regulation plan, they certainly bar the CAD from attempting to conduct such an investigation after BellSouth's plan has been approved and has become effective. Additionally, if general discovery principles prohibit parties from conducting burdensome fishing expeditions, they also prohibit the CAD from conducting an archaeological expedition for fossils of regulatory concepts that died long ago. The CAD's Motion to Compel, therefore, should be denied.

II. IF (AND ONLY IF) THE CAD IS PERMITTED TO EXPLORE BELL SOUTH'S RATE BASE, RATE-OF-RETURN PAST, BELL SOUTH SHOULD BE ENTITLED TO EXPLORE THE RATE BASE, RATE-OF-RETURN ATTACKS THE CAD HAS LAUNCHED AGAINST BELL SOUTH'S TARIFFS.

To the extent that the CAD's Motion to Compel is granted (which it should not be), BellSouth is entitled to conduct discovery designed to enable it to defend itself against the attacks the CAD intends to launch against its tariff. Thus to the extent that the CAD's Motion to Compel is granted, the CAD should be required to provide the same level of detail in its responses to BellSouth's Data Requests as it seeks from BellSouth's responses to the CAD's Data Requests. For instance, the CAD that complains that the voluminous documentation provided by BellSouth³ is inadequate is the same CAD that provided no documents whatsoever in response to BellSouth's thirty-nine Data Requests. The CAD that complains that BellSouth has asserted work product and attorney-client privilege is the same CAD that invokes the exact same privileges in its responses to BellSouth's Data Requests. Clearly, the CAD cannot have its cake and eat it too.

More specifically, to the extent that the CAD's Motion to Compel is granted, BellSouth is entitled to more complete responses to the following Data Requests:⁴

1. As noted below, the CAD states in its Response to Data Request No. 2 that "BellSouth already has these facts and documents [supporting the CAD's response to Data Request No. 1] in its possession" The CAD may not force BellSouth to guess at which of the many documents in BellSouth's possession the CAD thinks supports the CAD's

³ BellSouth provided this documentation subject to the objections it raised in its Responses to the CAD's Data Requests.

⁴ A copy of the CAD's Response to BellSouth's Data Requests is attached.

attack on BellSouth's tariff. At a minimum, the CAD should be required to identify with particularity the specific documents to which this Response refers.

2. The CAD merely refers to its Response to Request No. 1 and claims that "BellSouth already has these facts and documents in its possession" The CAD may not force BellSouth to guess at which of the many documents in BellSouth's possession the CAD thinks supports the CAD's attack on BellSouth's tariff. At a minimum, the CAD should be required to identify with particularity the specific documents to which this Response refers.
5. Again, the CAD merely refers to its Response to Request No. 1, which is referenced in its Response to No. 2 above. The CAD may not force BellSouth to guess at which of the many documents in BellSouth's possession the CAD thinks supports the CAD's attack on BellSouth's tariff. At a minimum, the CAD should be required to identify with particularity the specific documents to which this Response refers.
7. This Response merely recites the conclusions the CAD wants to draw from actions taken by the Public Service Commission years ago. At a minimum, the CAD should be required to support this Response by identifying with particularity the specific documents to which this Response refers (including without limitation references to Orders, hearing transcripts, exhibits, and similar documents).
8. The CAD has refused to specify the amount it contends is a "just and reasonable" late payment charge. This Request, however, goes to the very heart of the CAD's attacks on BellSouth's tariff, and the CAD should be compelled to either provide a specific amount or admit that it simply is not able to do so.
10. At a minimum, the CAD should be required to support this Response by identifying with particularity the specific documents (including without limitation Tariff references) which support its contentions that "BellSouth gives discounts, rebates or refunds to some business customers but not others" and that "the revenues associated with the proposed tariff are by BellSouth's own admission being attributed to benefit some

business customers. Other customers are not benefitting (sic) by the charge."

11. The CAD responds to this Request by merely referring to its Response to Request No. 10. At a minimum, the CAD should be required to identify with particularity the specific documents (including without limitation Tariff references) which support its contentions that "BellSouth gives discounts, rebates or refunds to some business customers but not others" and that "the revenues associated with the proposed tariff are by BellSouth's own admission being attributed to benefit some business customers. Other customers are not benefitting by the charge."
12. To the extent that the CAD incorporates "other responses and objections to this discovery" into its Response to Request No. 12, it should be required to specify those Responses and objections in detail and to produce or identify documents supporting those Responses.
14. The most objectionable thing about this Response is the CAD's purported contention that unlike any other business entity in existence, BellSouth does not incur any costs when its customers do not pay their bills by the due date. Beyond that, however, the CAD does not produce or identify any documents that purportedly support this silly contention. At a minimum, the CAD should be required to either support its Response by identifying with particularity the specific documents that support it (including without limitation references to Orders, hearing transcripts, exhibits, and similar documents) or simply admit that this contention is unsupported by any documents.
16. Again, the response to this Request refers to "related responses above." At a minimum, the CAD should be required to support its Responses by identifying with particularity the specific documents that support them (including without limitation references to Orders, hearing transcripts, exhibits, and similar documents).
18. This Request goes to the heart of the CAD's attack on BellSouth's tariff by asking the CAD to "identify each and every specific rate through which you contend BellSouth receives [compensation for late payments]." The CAD's Response merely recites conclusions the CAD wants to draw from actions taken

by the Public Service Commission years ago. At a minimum, the CAD should be required to support its Response by identifying with particularity the specific documents to which this response refers (including without limitation references to Orders, hearing transcripts, exhibits, and similar documents). Additionally, the CAD's Response contends that "[t]he whole of the rates for services listed in BellSouth's approved Tennessee Intrastate tariffs" compensate BellSouth for late payments. This contention simply ignores the fact that many of BellSouth's rates are below the cost of the service - they do not even compensate BellSouth for the service itself, let alone for late payments. If the CAD is going to rely on antiquated rate-of-return principles, it should be required to specifically identify, in good faith, all rates that it contends compensate BellSouth for late payments.

20. The CAD should be required to produce or identify any documents that purportedly support its Response to this Request.
23. This Request is directly relevant to the CAD's theory of the case and is not significantly different from questions posed by the CAD to which BellSouth entered "work product" objections. The CAD cannot have it both ways – either BellSouth's objections are valid and should be upheld, or the CAD should be required to provide a full and detailed response to this inquiry.
27. This Request is directly relevant to the CAD's theory of the case and is not significantly different from questions posed by the CAD to which BellSouth entered "work product" objections. The CAD cannot have it both ways – either BellSouth's objections are valid and should be upheld, or the CAD should be required to provide a full and detailed response to this inquiry.
30. If BellSouth is required to respond to similar Requests posed by the CAD, the CAD should be required to produce documents responsive to this Request.
31. The CAD should be required to produce or identify documents supporting its statement that "[f]or some of its privileged business customers, BellSouth provides annual discounts through special contracts." The CAD may not require BellSouth

to guess at the documents the CAD contends supports this position.

36. The CAD denies that BellSouth incurs costs in attempting to collect late payments and refers to its Response to Request No. 13. That response, however, does not produce or identify any documents supporting the CAD's silly contention that unlike any other business entity, BellSouth somehow does not incur costs in attempting to collect late payments. If the CAD is going to make such a silly contention, it should either produce or identify documents supporting the contention or admit that no such documents exist.
37. The CAD supports its claim that BellSouth's tariff is "unjustly, unreasonably, or unduly preferential or discriminatory" merely by referencing its paltry Response to Request No. 31. As noted above, however, Request No. 31 gives no indication whatsoever of any documents or facts supporting that response. Given that this Response forms the basis for one of the CAD's attacks on BellSouth's tariffs, the CAD simply must be forthcoming and produce or identify documents supporting this statement.

CONCLUSION

For the reasons stated above, the Hearing Officer should deny the CAD's Motion to Compel, deny BellSouth's Motion to Compel, and prohibit the parties from using any document during the hearing that is responsive to a Data Request and that has not been produced. To the extent that the CAD's motion is granted, however, the CAD should be required to provide the same level of response to BellSouth's Data Requests.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: 

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209670

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

- ☒ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight

Gary Hotvedt, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0500

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight

L. Vincent Williams, Esquire
Office of Tennessee Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243

Patrick Tume

SEE COURT OF APPEALS RULES 11 AND 12

Raymond E. STEINKERCHNER, Plaintiff/
Appellee,

v.

PROVIDENT LIFE & ACCIDENT INSURANCE
CO., Defendant/Appellant.

No. 01-A-01-9910-CH-00039.

Court of Appeals of Tennessee.

Sept. 22, 1999.

Appeal from the Chancery Court for Davidson
County, No. 98-530-III; Ellen Hobbes Lyle,
Presiding.

Michael E. Evans, and John F. Floyd, Evans, Todd
& Floyd, Nashville, TN, for Plaintiff/Appellee.

Steven A. Riley, W. Travis Parham, and Beth A.
Walla, Bowen, Riley, Warnock & Jacobson,
Nashville, TN, for Defendant/Appellant.

OPINION

COTTRELL.

*1 This is an extraordinary appeal pursuant to
Tenn.R.App.P. 10 arising from a discovery dispute.
For the following reasons, we reverse.

Appellee Dr. Raymond Steinkerchner, a self-
employed clinical psychologist, submitted a claim
for disability insurance to his insurer, Appellant
Provident Life & Accident Insurance Co.
("Provident"), based on angina and coronary artery
disease. When Provident denied the claim, Dr.
Steinkerchner commenced this action, alleging
breach of the disability insurance policy, bad faith
denial of the claim, and violation of the Tennessee
Consumer Protection Act, Tenn. Code Ann. §
47-18-101, et seq.

The underlying discovery dispute arose after Dr.
Steinkerchner propounded the following
interrogatory:

Identify by name, address, telephone number and
policy number each and every Tennessee resident
to whom Provident Life and Accident Insurance
Company had issued a job disability policy, upon

which a claim for disability benefits has been made
and subsequently denied in whole or in part by the
Defendant Provident Life and Accident Insurance
Company during the period of time after January
1, 1996.

Provident objected on the grounds that the
interrogatory was overly broad, unduly burdensome,
and not reasonably calculated to lead to the
discovery of relevant evidence.

Dr. Steinkerchner successfully moved to compel,
arguing that the information sought was needed to
show a pattern of improper denial of claims,
fraudulent marketing, and bad faith refusal to pay.
The purpose of the interrogatory was to obtain
information which would allow Dr. Steinkerchner's
counsel to contact other policyholders whose claims
had been denied. Dr. Steinkerchner has, in his
pleadings, claimed that Provident has entered in a
course of conduct to deny claims by others with
similar policies, but has identified no such others
and has not sought class certification.

The trial court granted the motion to compel. The
order directed Provident to comply with the
discovery request:

to the extent that the defendant is required to
create a computerized query for claims submitted
to Provident by Tennessee residents on or after
January 1, 1996, using the last claim status field.
The resulting list shall include name, address, and
policy numbers, and where available on the
computer, telephone numbers.

Shortly thereafter, the trial court decided to hold
the above-mentioned order in abeyance until
Provident filed a memorandum addressing "whether
it is [a] breach of someone's privacy to reveal to
third parties that they have filed a claim for
disability benefits."

On December 22, 1998, the trial court determined
that Dr. Steinkerchner sought no confidential
information. It ordered Provident to (1) comply with
its previous order regarding the names, addresses,
policy numbers and telephone numbers of its insured
who filed claims on or after January 1, 1996; (2) file
the resulting list with the court under seal; and (3)
send the following notice to the individuals included
on the list:

*2 Dear [Policy Holder]:

Presently pending in the Chancery Court for Davidson County, Tennessee is a lawsuit filed by a Provident Life and Accident Insurance Company policyholder, Raymond E. Steinkerchner, against Provident concerning a dispute about payments pursuant to the terms and provisions of a job disability policy.

Relative to the issues in that lawsuit, the names and identities of individual Tennessee residents who have been issued a job disability policy by Provident and have made a claim for disability benefits which has been denied in whole or in part during the period of time after January 1, 1996, have been filed under seal with the Court. By filing the information under seal, only the judge and attorneys may view the information.

Additionally, however, you may be contacted by the attorneys for the policyholder or Provident in an attempt to obtain evidence for the lawsuit ... Please be advised that you are not required to respond to this letter in any manner, and you certainly are not required to talk to or respond to calls or communications received from any of the attorneys in this lawsuit. (emphasis in original).

Provident filed a second unsuccessful motion for interlocutory appeal and then filed its successful Tenn.R.App.P. 10 application for extraordinary appeal in this court.

Provident maintains that the trial court erred by ordering it to produce confidential information relating to non-parties which was not relevant or calculated to lead to the discovery of admissible evidence.

Rule 26 of the Rules of Civil Procedure sets the basic parameters of permissible discovery. It states: IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible

evidence.

The scope of discovery, while broad, is not unlimited. See *Miller v. Doctor's General Hosp.*, 76 F.R.D. 136, 139 (W.D.Okla.1977).

Mere incantations that an opponent has acted in bad faith will not convert a simple contract lawsuit into a license to burden or harass one's adversary. Conclusory claims of bad faith may not be the bases for conducting marginally relevant discovery which is by its nature burdensome. Such discovery requests amount to nothing more than an out and out **fishing expedition**.

Marker v. Union Fidelity Life Ins. Co., 125 F.R.D. 121, 125 (M.D.N.C.1989).

***3** The issues in this case are limited to Provident's handling of Dr. Steinkerchner's claim for employment disability insurance benefits and to the adequacy of Provident's reasons for denying the claim. Provident's conduct regarding the unique insurance claims of others is not relevant to whether it properly handled the claim at issue. Dr. Steinkerchner may determine the reasons for Provident's conduct by deposing its employees and others who were involved in the decision to terminate his benefits. See *Moses v. State Farm Mut. Auto. Ins. Co.*, 104 F.R.D. 55, 57 (N.D.Ga.1984). Having discovered those reasons, Dr. Steinkerchner will then be in a position to produce evidence to challenge that decision. See *id.*

Although the complaint makes vague allegations that the denial of benefits was part of a course of conduct, at his deposition Dr. Steinkerchner admitted that he had no information about other policyholders' dissatisfaction with Provident. Dr. Steinkerchner's speculative accusations about a course of conduct do not suffice to demonstrate the relevance of Provident's handling of other claims. He has been unable to identify the particular course of conduct he alleges exists, merely itemizing actions taken in handling of his claim. Thus, we find that the requested information is unlikely to lead to relevant evidence.

Under these circumstances, we must reverse the trial court's decision to permit the requested discovery. In light of this finding, we need not reach the remaining issues asserted by Provident. This case is remanded to the trial court for proceedings consistent with this opinion and such further

Not Reported in
(Cite as: 1999 WL 734545, *3 (Tenn.Ct.App.))

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proceedings as may be necessary. Costs of this
appeal are to be taxed to Dr. Steinkerchner.

CANTRELL, P.J., and CAIN, J., concur.

END OF DOCUMENT

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SEE COURT OF APPEALS RULES 11 AND 12

CONSUMER ADVOCATE DIVISION, on Behalf
of TENNESSEE CONSUMERS and the Attorney
General of Tennessee, Petitioner/Appellant,
v.
TENNESSEE REGULATORY AUTHORITY,
Respondent/Appellee.

No. M199902151COAR12CV.

Court of Appeals of Tennessee.

Jan. 10, 2000.

Appealed from the Tennessee Regulatory Authority
at Nashville, Tennessee.

Paul G. Summers Attorney General & Reporter,
Michael E. Moore, Solicitor General, L. Vincent
Williams, Assistant Attorney General, Nashville,
TN, for appellant.

J. Richard Collier, H. Edward Phillips, Tennessee
Regulatory Authority, Nashville, TN, for appellee
Tennessee Regulatory Authority.

Guy M. Hicks, Patrick W. Turner, Nashville, TN,
Bennett L. Ross, Atlanta, GA, for the appellee
BellSouth Telecommunications, Inc.

OPINION

CANTRELL.

*1 After this court remanded a prior appeal saying that "the Tennessee Public Service Commission ... should have approved BellSouth's application for a price regulation plan based on BellSouth's rates existing on June 6, 1995", the Tennessee Regulatory Authority entered an order approving a price regulation plan based on the data used in the 1995 application. The State Attorney General's Consumer Advocate Division levels a broad attack on the order, asserting that this court's prior order did not mandate the result below, and that the order violates state and federal law. We hold that the Authority was not required by our prior order to take the action it took but that the order was within the Authority's discretion. Therefore, we affirm.

I.

We refer to our prior opinion in *BellSouth Telecommunications v. Greer*, 972 S.W.2d 663 (Tenn.Ct.App.1997) for the facts leading up to the approval of price regulation plans for local telephone companies. As that opinion recites, BellSouth applied for a price regulation plan on June 20, 1995 and an audit of BellSouth's Form PSC-3.01 report of March 31, 1995 showed a rate of return within the range set by the Public Service Commission's order in 1993. Nevertheless, the Commission's staff recommended some adjustments to the 3.01 report, and the Commission ordered BellSouth to reduce its rates by \$56.285 million.

On appeal this court held that the Commission did not have the power to adjust the figures in the 3.01 report, and we remanded the case "to the Tennessee Regulatory Authority with directions to approve BellSouth's application for a price regulation plan." 972 S.W.2d at 682. BellSouth filed a petition to rehear seeking an order from this court that the price regulation plan became effective on March 1, 1995. We declined the invitation and left it up to the agency "to carry out its task in a manner consistent with its statutory authority." 972 S.W.2d at 683.

On remand BellSouth contended that this court's opinion required an immediate order approving a price regulation plan and moved for a plan effective as of October 1, 1995. BellSouth conceded that the freeze on basic rates and call waiting services should be extended to August 1, 2002 and that the indexing for annual adjustments for basic and non-basic rates should begin on August 1, 1998. The Consumer Advocate Division moved to start over. The Regulatory Authority approved BellSouth's motion with one exception. The annual adjustments for basic and non-basic services will be calculated from December 1, 1998.

II.

The Scope of the Remand

The Consumer Advocate Division asserts that the Regulatory Authority erred in concluding that this court's opinion required it to take the action it took. A remand may take one of several forms. It may dictate the course of further proceedings, *Hoover v. Metropolitan Board of Zoning Appeals*, 955 S.W.2d 52 (Tenn.Ct.App.1997), it may be made for a

specific purpose. *Mathis v. Campbell*, 22 Tenn.App. 40, 117 S.W.2d 764 (Tenn.Ct.App.1938), or it may be open and general. Here, however, we agree that this court's remand did not require the Authority to approve, without qualification or further inquiry, BellSouth's 1995 application. On the petition to rehear in *Greer*, we made the following observations with respect to BellSouth's request for a holding that its price regulation plan became effective on March 1, 1996:

*2 Our October 1, 1997 opinion focused on the procedure employed by the Tennessee Public Service Commission to consider and act on BellSouth's application for a price regulation plan. Rather than focusing on the substance or merits of the Commission's decision, we held that the procedure the Commission followed did not comply with Tenn.Code Ann. § 65-5-209. Accordingly, we vacated the Commission's orders and remanded the case to its successor for further proceedings consistent with the requirements of Tenn.Code Ann. § 65-5-209.

* * *

The doctrine of separation of powers counsels the courts to avoid requiring an administrative agency to take a particular action except in the most extraordinary circumstances. We should decline, for constitutional and practical reasons, to shoulder an agency's responsibilities. Thus, the goal of a remand in cases of this sort should generally be to require the agency to carry out its task in a manner consistent with its statutory authority. See *Hoover, Inc. v. Metropolitan Bd. Of Zoning Appeals*, 955 S.W.2d 52, 55 (Tenn.Ct.App.1997). Throughout these proceedings, BellSouth consistently asserted that the procedure followed by the Commission was not authorized by Tenn.Code Ann. § 65-5-209 and requested the courts to require the regulators to make their decisions in accordance with Tenn.Code Ann. § 65-5-209. Our October 1, 1997 opinion settles the dispute concerning what Tenn.Code Ann. § 65-5-209 requires. Now it falls upon the Tennessee Regulatory Authority to consider BellSouth's application for a price regulation plan in accordance with Tenn.Code Ann. § 65-5-209.

The key to the scope of the remand is contained in the last quoted paragraph. We resolved one question about price regulation. We left it to the Authority to consider BellSouth's application in accordance with

Tenn.Code Ann. § 65-5-209 and to "carry out its task in a manner consistent with its statutory authority." Therefore, the Authority was not under a mandate to take any particular action. It could not, however, adjust the actual results on BellSouth's 3.01 report.

III.

The Regulatory Authority's Decision

Our conclusion that the Authority was not compelled to take the action it took opens up the question of whether it was compelled to take some other action. The Consumer Advocate Division attacks the Agency's action on several fronts.

A. The 3.01 Audit

The Consumer Advocate Division asserts that the Authority did not have the assurance that BellSouth's March 1995 3.01 report was in compliance with generally accepted accounting principles. See Tenn.Code Ann. § 65-5-209(j). The Agency staff gave a "negative" assurance, meaning that it did not make that determination itself but relied on the company's internal controls and independent auditors for the assurance.

After initially making the same arguments in the prior proceeding, the Consumer Advocate Division dropped its objection and did not pursue it on appeal—despite a finding by the PSC that the 3.01 report accurately reflected BellSouth's earned rate of return according to generally accepted accounting principles. By failing to challenge that finding on appeal, the Consumer Advocate Division waived any objection to it, *Lewter v. O'Connor Management, Inc.*, 886 S.W.2d 253 (Tenn.Ct.App.1994), and it is now the law of the case. See *Ladd v. Honda Motor Co.*, 939 S.W.2d 83 (Tenn.Ct.App.1996).

*3 In addition, in the prior appeal the Consumer Advocate Division actually defended the PSC's action, because it resulted in a sizeable reduction in rates. Having taken that position, the Division must confront the rule that a litigant is required to act consistently throughout the litigation. *Fidelity-Phenix Fire Ins. Co. v. Jackson*, 181 Tenn. 453, 181 S.W.2d 625 (Tenn.1944). Other courts have talked in terms of judicial estoppel. See *Bubis v. Blackman*, 58 Tenn.App. 619, 435 S.W.2d 492 (Tenn.Ct.App.1968); *Stamper v. Venable*, 117

Tenn. 557, 97 S.W. 812 (Tenn.1906). Thus, we conclude that the objections to the 3.01 audit cannot be pursued on this appeal.

B. Federal Preemption

The Consumer Advocate Division devotes a lengthy part of its appellate brief to an argument that the preemptive effect of the Federal Telecommunications Act of 1966 (which took pay phones out of regulated operations) was a compelling reason to reopen the case below. In the prior appeal AT & T argued that federal preemption was a reason to deny price regulation and remand the case to the Regulatory Authority for consideration of that issue. We rejected AT & T's argument then, in part because some of the issues were already before the Authority in separate proceedings involving AT & T and BellSouth. We said, "This type of proceeding, and others like it, provide the parties with an appropriate forum to air out and resolve more clearly defined issues concerning the possible preemptive effect of the specific provisions of the Telecommunications Act of 1966...."

In this appeal BellSouth points out that the changes in payphone regulation are already the subject of a separate proceeding pending before the Authority. We think our decision in Greer applies with equal force to this issue. We are not convinced that a federal law prohibiting pay phones from being subsidized by the company's rate-payers affects BellSouth's price regulation plan, but the pending proceeding can determine if BellSouth's rates should be adjusted to reflect the changes in the law.

C. Retroactive Ratemaking

The Consumer Advocate Division asserts that the Authority engaged in retroactive ratemaking by approving BellSouth's price regulation plan effective October 1, 1995. See *South Central Bell v. Tennessee Public Service Commission*, 675 S.W.2d 718 (Tenn.Ct.App.1984). We disagree.

The Regulatory Authority's order did not attempt to

change rates retroactively. The rates had been in effect for some time before the June 6, 1995 application for price regulation. The whole thrust of the Consumer Advocate Division's four year effort has been to convene a contested case hearing for the purpose of setting new rates. The only rate changes under the Authority's December 1998 order will be prospective. Annual rate adjustments for nonbasic services are to be calculated from December 1, 1998, and there can be no increase in the rates for basic services or call waiting until December 1, 2002. By making the order prospective only, the Authority avoided the charge that future ratepayers would "pay for past use," which is the essence of retroactive ratemaking. *Porter v. South Carolina Public Service Comm'n*, 328 S.C. 222, 493 S.E.2d 92 (S.C.1997). The order also eliminated BellSouth's right to seek an increase in nonbasic services in 1996, 1997, and 1998, which it would have had if the Public Service Commission had acted lawfully in 1995. As we view it, the Authority's order places BellSouth as nearly as possible in the position they would have been in except for the Commission's error. That was the goal of the Authority on remand. See *Hoover, Inc. v. Metropolitan Board of Zoning Appeals*, 955 S.W.2d 52 (Tenn.App.1997).

IV.

*4 "The sole concern of the courts, at each stage of appellate review, it to determine whether the [Regulatory Authority's] action on the matters raised by the application meet the requirements of the law." *CF Industries v. Tenn. Public Service Commission*, 599 S.W.2d 536 at 544 (Tenn.1980). We are satisfied that the Authority acted within the scope of its powers.

We affirm the Authority's order and remand the cause to the Authority for any further proceedings that are necessary. Tax the costs on appeal to the Consumer Advocate Division.

KOCH and CAIN, JJ., concur.

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SEE COURT OF APPEALS RULES 11 AND 12
BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner/Appellant,
v.
Keith BISSELL, Steve Hewlett, Sara Kyle,
Constituting the Tennessee Public
Service Commission, Respondents/Appellees.

No. 01-A-01-9509-BC00400.

Court of Appeals of Tennessee.

Oct. 2, 1996.

FOR APPELLANT: Bennett L. Ross Nashville,
Tennessee

FOR INTERVENOR AT & T
COMMUNICATIONS, INC: Val Sanford John
Know Walkup Nashville, Tennessee FOR
APPELLEES: Dianne F. Neal Public Service
Commission Nashville, Tennessee

FOR TENNESSEE CONSUMERS: Charles W.
Burson Attorney General & Reporter Michael E.
Moore Solicitor General L. Vincent Williams
Consumer Advocate Division Nashville, Tennessee

OPINION

CANTRELL, Judge.

*1 The Tennessee Public Service Commission ordered the completion of a previously authorized investigation of the future earnings of BellSouth Telecommunications, despite legislative developments that stripped the Commission of its authority to use such an investigation to set telephone rates. BellSouth filed a petition with this court for review of the PSC's order, arguing that completion of the investigation was inconsistent with the legislative purpose. We reverse the Commission's order and remand the case for further consideration by the Tennessee Regulatory Commission.

I.

Prompted by a petition filed by the State Consumer Advocate, the Public Service Commission voted on March 28, 1995 to conduct an investigation of the

intrastate earnings of South Central Bell (now BellSouth Telecommunications) for a one-year future test period. Under the statute in effect at that time, such an investigation of future earnings was a required preliminary step in the performance of the P.S.C.'s function of establishing "just and reasonable rates" for telephone service.

On May 25, 1995, the Legislature enacted the Telecommunications Reform Act, now codified at Tenn.Code Ann. § 65-5-201 et seq. The new act was expressly designed to encourage competition in the telecommunications services market, and it created an alternative to the traditional method of establishing consumer telephone rates by future rate-of-return analysis.

Under the new procedure, a telephone company could apply for price regulation, and the P.S.C. was required to implement a price regulation plan within 90 days, based on an audit of the rate of return earned by the utility within the most recent reporting period. See Tenn.Code Ann. § 65-5-209(c) and (j). Thus the statute permitted expedited decision-making based on retrospective rather than prospective financial data.

BellSouth applied on June 20, 1995 for price regulation under the new statute. Nonetheless, on July 14, 1995 the Commission voted to complete the earnings investigation, reserving the issue of "whether any use could be made of the results of this investigation under the price regulation scheme set out in the Telecommunications Act...." BellSouth filed a petition under Rule 12, Tenn.R.App.P. to appeal that order. The PSC and intervenor AT & T filed a joint motion to dismiss the petition, on the ground that the order of investigation was not a final order subject to appellate review.

On October 25, 1995, this court dismissed the joint motion on the ground that "interlocutory administrative orders are reviewable where the agency has plainly exceeded its statutory authority or threatens irreparable injury in clear violation of an individual's rights." This court also stayed all proceedings in the Commission related to the earnings investigation, and directed that the appeal proceed.

On July 1, 1996, the PSC was replaced by a new,

appointed agency called the Tennessee Regulatory Authority. See Tenn.Code Ann. § 65-1-201. On June 11, 1996, this court heard oral arguments on BellSouth's petition for review. Neither in the briefs nor in oral argument did the PSC articulate a reason why the investigation should continue. The parties all acknowledge that the information gained through the investigation would be irrelevant to BellSouth's rates. The PSC argues only that the investigation might serve some purpose.

***2** We think the PSC's decision to continue the investigation is simply arbitrary, a decision "that is not based on any course of reasoning or exercise of judgment." See *Jackson Mobilphone v. Tennessee PSC*, 876 S.W.2d 106 at 111 (Tenn.App.1993). An agency's arbitrary decision--even a preliminary, procedural, or intermediate one--may be reversed by the reviewing court. Tenn.Code Ann. §

4-5-322(a)(1), (h)(4).

We are aware that in adopting regulatory reform the legislature was careful to say that nothing in the act would "affect the authority and duty of the Commission to complete any investigation pending at the time" the act became effective. See Acts 1995, ch. 408. But we do not think the legislature intended to authorize the PSC to continue an investigation that no longer had any purpose.

We, therefore, reverse the PSC's order continuing the earnings investigation and remand the cause to the Tennessee Regulatory Authority for further proceedings consistent with this opinion. Tax the costs on appeal to the PSC. LEWIS and KOCH, JJ., concur.

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TN

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CONSUMER ADVOCATE DIVISION)

v.)

BELLSOUTH TELECOMMUNICATIONS,)
INC.)

DOCKET NO. 00-00041

OFFICE OF THE
EXECUTIVE SECRETARY

RECEIVED

APR 06 2000

THE CONSUMER ADVOCATE DIVISION RESPONSES
TO BELLSOUTH TELECOMMUNICATIONS, INC.'S DATA REQUEST OF MARCH 23, 2000
TN REGULATORY AUTHORITY
GENERAL COUNSEL'S OFFICE

The Consumer Advocate Division and its counsel assert and invoke their privileges regarding detailed legal basis or theory and work product. The Consumer Advocate Division and counsel objects to any and all discovery propounded by BellSouth which requests the same. Response to the valid part of associated discovery does not waive and is not intended to waive the assertion of any privilege.

1. Does the CAD contend that the late payment charge in BellSouth's proposed tariff is a charge or rate for telecommunications service(s)? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. The proposed tariff adds to the existing charge for service for particular customer of BellSouth and other carriers and is excessive and unreasonable, since the company is already being compensated for the late payments in its rates and contracts. The label used by BellSouth to describe compensation is of no consequence. For example, BellSouth would not be able to escape regulation by simply labeling its compensation for local basic exchange services as the "charge" for basic service, instead of the "rate" for basic service. Similarly, BellSouth could not escape the effect of Tenn. Code Ann. § 65-5-208(a)(a) by changing the label of the service.

BellSouth is a public utility operating under title 65. It can only receive compensation for providing service. There is no authority for the telecommunications utility to provide any thing else unless the service is exemption in by state or federal law. Tenn. Code Ann. § 65-4-101 (c).

When a public utility seeks to compensate itself and its shareholders for the "arguable" recurring and non-recurring cost of serving a customer who has not paid the bill on time, it is a rate or charge for telecommunications service (s). These costs include all recurring and nonrecurring costs associated with or arising out of the regulatory contract to provide services, they include but are not limited to, the working capital effects on the company associated with the provision of service. The rate or charge associated with late payments is simply a subcategory of the cost of providing service, which is similar to the cost of maintaining facilities or repairing facilities or billing. In fact, a structured late charge payment is nothing more than a modified billing mechanism for service provided to a customer. The basis of and for the company's compensation arises out of the contract with the customer.

The contract is the same bundled regulatory contract which existed on June 5, 1995, June 6, 1995 or December 1, 1998. The contract with the customer for local basic exchange services and non basic services was ratified and offered by the legislature and accepted by BellSouth when it applied for price regulation. BellSouth waived other alternatives when it objected to the TPSC's or the TRA's setting of its initial rates. The legislative regulative contract did not provide for a separate additional late payment charge. BellSouth seeks to change that legislative contract to provide additional compensation for the provision of the service. See, also Black's Law Dictionary, 5th edition which provides that a charge is the price of, or rate for, something. In connection with public utilities, a rate is a charge to the public for a service open to all upon the same terms.

The late payment consideration and compensation is also part of the contract between BellSouth and its non-basic service customers on June 6, 1995 and December 1, 1998. BellSouth may change that non-basic contract, however, only so long as it maintains the aggregate revenue cap provided in Tenn. Code Ann. § 65-5-209. See also Tenn. Code Ann. § 65-5-208 (a)(1).

When the company institutes a rate or charge associated with the cost of the provision of service by other companies it goes beyond simply billing for a customer. It is mandating and imposing a unilateral new contract and relationship which the customer has not accepted. A valid contract between BellSouth and the customer for additional charges must show an offer, acceptance and consideration. BellSouth's late payment charge, when it bills for other companies shows neither. BellSouth classifies late payments as payment for service. Furthermore, the charges associated with the provision of service by other

companies are subject to the just and reasonable test, including but not limited to an earnings investigation, which would test the charge by a non-price regulation plan company. If BellSouth takes on the attributes of a non-price regulated company, by separate and independent contract, it becomes subject to the same extent of review or even renounces its price cap status. The company can not have it both ways. BellSouth also computes the late payment charge as a percentage of service price.

The Consumer Advocate Division objects to this request to the extent it requires disclosure of work product.

2. Does the CAD contend that the late payment charge in BellSouth's proposed tariff is a charge or a rate for basic local exchange telephone service(s)? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. See, number 1 above. In addition, BellSouth already has these facts and documents in its possession and the Consumer Advocate Division objects that BellSouth's request is unduly burdensome.

3. Please admit that customers who pay their bills by the due date will not be affected by the late payment charge in BellSouth's proposed tariff.

Response: The Consumer Advocate Division admits that customers who pay by the due date will not be double charged or pay an increased rate for service. However, we note that customers who pay their bills early are not given a 3% discount, while BellSouth gives its preferred business customers discounts. If BellSouth is entitled to additional charges above and beyond those existing for the beginning period of plan approval, early paying customers are providing BellSouth with additional compensation that BellSouth is using to reduce the rate charged for a service that it considers more competitive. If there is a late payment charge there should be a reciprocal discount for early payers. The Division denies the request to admit if intended for any other purpose.

4. If you do not admit Request No. 3, please explain in detail how customers who pay their bills by the due date will be affected by the late payment charge in BellSouth's proposed tariff, identify all facts supporting your response, and produce all documents supporting your response.

Response: N/A.

5. Does the CAD contend that the late payment charge in BellSouth's proposed tariff is a charge or rate for non-basic service(s)? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. See answer to number 1 above.

6. Please admit that BellSouth's monthly rate for residential Flat Rate Main Station Service in Rate Group 5 is \$12.15.

Response: Admitted to the extent that the request to admit is intended to mean the bundle of things, services and charges encompassed by the service which BellSouth has named in its tariff "Residential Flat Rate Main Station Service in Rate Group 5" is \$12.15. Denied if the request to admit is not intended to encompass the response as admitted.

7. The Complaint filed by the CAD alleges that "the late charge proposed in the tariff is more than just and reasonable. . . ." See Complaint ¶ 18. Please explain in detail the factual and legal basis for your contention, identify all facts supporting this contention, and produce all documents supporting this contention.

Response: The compensation deemed reasonable for late payments was deemed reasonable at the time initial rates were set. BellSouth waived, is guilty of laches, objected to, refused and declined to have individual rates set.

When the Tennessee Public Service Commission set the rates that eventually became the rate deemed just, reasonable, and affordable as BellSouth's initial rates under price regulation, the cost of the working capital needed due to customers' delays in payment were included as a cost of service. In addition to the required working capital, the Commission included any collection costs BellSouth forecast to be incurred. The charge is not the lowest possible charge and there is no evidence that any other money should be attributed to existing compensation and BellSouth's rate of return on equity exceeds 30% which makes the charge unnecessary. In addition, the charge makes service less affordable for some Tennessee consumers.

8. The Complaint filed by the CAD alleges that "the late charge proposed in the tariff is more than just and reasonable. . . ." See Complaint ¶ 18. Please specify the amount that the CAD alleges is a "just and reasonable" late charge, explain in detail the factual and

legal basis for your response, identify all facts supporting your response, and produce all documents supporting your response.

Response: The Consumer Advocate Division submits that the associated compensation in the amount deemed just, reasonable and affordable when the price regulation plan is effectuated as just and reasonable and affordable by operation of law. See also the responses to other discovery propounded in this request by BellSouth for more detailed responses. Those responses are incorporated herein by reference. The Consumer Advocate Division may also update this answer upon complete discovery.

9. Please admit that to the best of your knowledge, nearly 100% of BellSouth's customers can pay local basic exchange service.

Response: Denied or unable to admit or deny. The U.S. Census Bureau County estimates for poverty indicates that a substantial number of consumers may have few resources to apply to service. The number of person in poverty is substantially less than 100%. The timeliness of payment, however, may be impacted by their individual circumstances.

10. Does the CAD contend that BellSouth's proposed tariff has the effect of "providing or withholding a benefit?" See Complaint at ¶ 15. If so, please specify each and every benefit the CAD contends the tariff effectively provides or withholds, explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. BellSouth gives discounts, rebates or refunds to some business customers but not others. In addition, the revenues associated with the proposed tariff are by BellSouth's own admission being attributed to benefit some business customers. Other customers are not benefitting by the charge.

11. Does the CAD contend that BellSouth's proposed tariff would result in BellSouth's "render[ing], or pay[ing], for a service for one customer but not another?" See Complaint at ¶ 16. If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. See response to No. 10 above.

12. Does the CAD contend that any legal authority (including but not limited to statutes, rules, regulations, and case law) prohibits the Tennessee Regulatory Authority from approving BellSouth's proposed late payment tariff? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. Tenn. Code Ann. § 65-5-208; 65-5-209; 65-4-123; See also other responses and objections to this discovery which are incorporated herein by reference.

13. Please admit that BellSouth incurs costs when its customers do not pay their bills by the due date.

Response: Denied. The Consumer Advocate Division admits, however, that BellSouth's customers incur cost for the provision of service including the costs associated with billing and collection. The cost of billing and collection, including the cost of working capital that was required because of the lag between the date service is provided and the date revenues are collected, were included when the rates that became BellSouth's initial rates under price regulation were approved. The lag in payment was computed on the basis of actual experience of BellSouth that reflected the payment patterns of customers, and the collections costs were those budgeted by BellSouth. As a result, BellSouth is currently being compensated for those costs through rates being charged BellSouth's customers who incur the cost overall. In addition, cost incurred by BellSouth in relation to service provided by other entities is BellSouth's voluntary choice.

14. Does the CAD contend that BellSouth does not incur costs when its customers do not pay their bills by the due date? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. The mere fact that BellSouth bills or does not receive payment or does not receive payment by the due date does not necessarily result in BellSouth incurring cost. Regulation insured in the past and continues to ensure that BellSouth's customers incur cost for the provision of service including the costs associated with billing and collection through service rates charged and paid. The cost of billing and collection, including the cost of working capital required because of the lag between the date service is provided and the date revenues are collected, were included when the rates that became BellSouth's initial rates under price regulation were approved. The lag in payment was computed on the basis of actual experience of BellSouth that reflected the payment patterns of customers, and the collections costs were those budgeted by BellSouth. As a result, BellSouth is currently being compensated for those costs through rates being charged BellSouth's customers who incur the cost.

15. Please admit that BellSouth incurs costs when its customers do not pay for services that BellSouth bills on behalf of others through its telephone bill (i.e., toll charges for IXCs) by the due date.

Response: Denied.

16. Does the CAD contend that BellSouth does not incur costs when its customers do not pay for services that BellSouth bills on behalf of others through its telephone bill (i.e., toll charges for IXCs) by the due date? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. Incurred costs arise from the operation of law, not through voluntary contract. See related responses above.

17. The Complaint filed by the CAD alleges that BellSouth's proposed tariff "makes service price differences with respect to local basic exchange services and other services under its tariff." See Complaint at ¶ 30. Please identify each and every alleged service price difference, explain in detail the factual and legal basis for this allegation, identify all facts supporting this allegation, and produce all documents supporting this allegation.

Response: Late paying customers will compensate BellSouth twice under the proposed tariff. First the compensate Bell through the working capital needs, etc. built into the rates. Then they will compensate Bell again through the proposed charge.

18. Does the CAD contend that BellSouth receives compensation for late payments through any existing rate(s)? If so, please identify each and every specific rate through which you contend BellSouth receives such compensation, explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. The whole of the rates for services listed in BellSouth's approved Tennessee Intrastate tariffs on file with the Tennessee Regulatory Authority. When the Tennessee Public Service Commission approved the rates that eventually became BellSouth's initial rates under its price regulation plan, the working capital required to finance the operations of the utility from the time service is provided until the time that revenues are collected was included as a component of the rate

base. The time lag used was based on a BellSouth lead lag study of the Company's billing and collection experience and included the lag between the date service was provided and the time of collection from those customers who paid late as well as those customers who paid on time. The rates also were set at the level to allow BellSouth to recover its reasonable operating experience which includes collection costs related to those who pay late, since billing and collections are considered a normal part of any business operations.

The approved tariffs, the working capital study submitted by BellSouth, and BellSouth's forecast of operating costs that formed the basis for the Public Service Commission's decision are in BellSouth's possession. This response incorporates the responses to other discovery requests by reference. BellSouth has not shown that compensation under current rates to be unjust.

19. Please admit that BellSouth is operating pursuant to an approved price regulation plan.

Response: Denied. There is no articulable plan. The Consumer Advocate Division contends that the "plan" is ultra vires, unlawful and voidable. The Consumer Advocate Division admits that the Tennessee Regulatory Authority through a December 9, 1998 Order purports to have approved BellSouth's application retroactively to 1995 in contravention of the 1995 Tennessee Public Acts, chapter 305 and Tenn. Admin. Rule 1220-4-2-.55(1)(e).

20. The Complaint filed by the CAD alleges that approving BellSouth's tariff would be contrary to Tenn. Code Ann. § 65-4-123 which provides that "the regulation of telecommunications services and telecommunications services providers shall protect the interest of consumers without unreasonable prejudice or disadvantage to any telecommunications service provider. . . See Complaint ¶ 33. Please explain in detail the factual and legal basis for this allegation, identify all facts supporting this allegation, and produce all documents supporting this allegation.

Response: BellSouth intends to subsidize its particular business service revenues by adding additional charges to residential and small business basic local exchange service due to its near monopoly position in the market place. Since it is already earning a 30% return on equity on its Tennessee operations and there is no evidence that any other company's basic local exchange service for Tennessee operations in BellSouth's service area achieves a similar return, BellSouth is using its monopoly power to harm competitors. The company has not shown any unreasonable prejudice or disadvantage and is in fact achieving a record rate of return on its investment used to provide service in Tennessee.

21. Please identify in detail the legal authority (including but not limited to statutes, rules,

regulations, and case law) the CAD contends governs the extent to which the following entities may impose a late payment charge: (a) BellSouth; (b) any other incumbent local exchange telephone company operating under price regulation; (c) an incumbent local exchange telephone company not operating under price regulation; and (d) a competing telecommunications service provider.

Response: The Consumer Advocate Division objects to this discovery request as unduly burdensome, irrelevant and as an impingement on the Attorney General's investigatory and prosecutorial powers and work product. Without waiving this objection, the Consumer Advocate Division submits that the General Assembly specifically set the policy for companies applying for price regulation in the 1995 Public Acts, chapter 408. BellSouth has the legislative history in its possession. BellSouth voluntarily brought itself within that policy group.

22. Please admit that Tenn. Code Ann. § 65-4-123 requires among other things that regulation shall not unreasonably prejudice or disadvantage any telecommunications services provider.

Response: Tenn. Code Ann. § 65-4-123 requires what it requires. Moreover, denying the proposed tariff does not unreasonably prejudice and disadvantage BellSouth.

23. What is the legal standard the CAD contends is applicable in determining whether a late payment charge imposed by each of the following entities is just and reasonable: (a) BellSouth; (b) any other incumbent local exchange telephone company operating under price regulation; (c) an incumbent local exchange telephone company not operating under price regulation; and (d) a competing telecommunications service provider. Please set forth in detail the factual and legal basis for each response, identify all facts supporting each response, and produce all documents supporting each response.

Response: The Consumer Advocate Division objects to this discovery request as unduly burdensome, irrelevant and as an impingement on the Attorney General's investigatory and prosecutorial powers and work product. Without waiving this objection, the Consumer Advocate Division submits that the General Assembly specifically set the policy for companies applying for price regulation in the 1995 Public Acts, chapter 408. BellSouth has the legislative history in its possession. BellSouth voluntarily brought itself within that policy group.

24. Please admit BellSouth's cost of an unbundled loop is more than \$12.15 per month.

Response: Denied. The determination of the cost of BellSouth's unbundled loop is the subject of a pending docket before the Tennessee Regulatory Authority. In addition the cost of an unbundled loop in isolation has little meaning without consideration of the revenues billed to customers who utilize such a loop. For

example, a customer in a Rate Group 5 exchange who purchases Flat Rate Residential Service is billed \$3.50 as a Subscriber Line Charge, a \$1.25 for TouchTone charge, \$12.15 as a local exchange service charge, and the presubscribed long distance carrier is billed a \$1.04 Prescribed Interexchange Carrier Charge (PICC), a total of \$17.94 before revenues from long distance service, usage sensitive access charges, or any vertical services such as Call Waiting or Call Forward are considered. To illustrate, for the twelve months ended November 1999 the average local service revenue per line per month was \$33.97 per month ¹ (\$1,099,411,000/2,696,758/12=\$33.97 TRA 3.01 Report November 1999). BellSouth's reported intrastate profit (net income) for the same period was an average of \$7.43 per line per month even with BellSouth's excessive depreciation rates. From this it is apparent that BellSouth is recovering well in excess of the cost service, including cost resulting from late payments, from its Tennessee ratepayers.

[¹ The total (local, long distance, & miscellaneous service) average intrastate revenue per line was \$39.95 per month (\$1,292,737,000/2,696,758/12) and the total average combined interstate and intrastate revenue per month \$53.55 (\$1,732,990,000/2,696,758/12) while the combined average profit per month was \$9.82 (\$318,034,000/2,696,758/12). The revenues and line count are as reported by BellSouth on its November 1999 monthly report to the TRA.]

25. Does the CAD contend that BellSouth's cost of an unbundled loop is more than \$12.15 per month? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: The Consumer Advocate Division can neither admit nor deny. The Consumer Advocate Division objects to the remainder of this interrogatory as unduly burdensome and is irrelevant.

26. BellSouth's Answer to the CAD's Complaint identifies several CLEC tariffs which provide for late payment charges. See Answer at 2 n.1. For each company identified in that document, please state whether the CAD has attempted to investigate whether that company's late payment charge is just and reasonable or otherwise appropriate.

Response: The Consumer Advocate Division objects to this interrogatory and asserts its and the Attorney General's investigative and prosecutorial privilege and Tenn. Code Ann. § 10-7-504 (a)(5).

27. If the CAD has attempted any investigation described in Item No. 29, please describe the investigation with specificity and produce all documents related to or arising out of such investigation.

Response: The Consumer Advocate Division objects to this interrogatory and asserts its and the Attorney General's investigative and prosecutorial privilege and Tenn. Code Ann. § 10-7-504 (a)(5).

28. If the CAD has not attempted any investigation described in Item No. 29, please explain in detail the reasons the CAD has not done so.

Response: The Consumer Advocate Division objects to this interrogatory. See objections above.

29. Please produce any and all information received or considered by the CAD from any public or private entity in the southeastern United States concerning credit granting policies that are allegedly "comparable" to those of BellSouth.

Response: Consumer Advocate Division will update this discovery response as necessary.

30. Is the CAD aware of any consumer complaints regarding BellSouth's proposed late payment charge? If so, please identify in detail the nature of each such complaint and the persons or entity who registered such complaints, and please produce all documents related to or arising out of such complaints.

Response: The Consumer Advocate Division objects to the relevancy of this interrogatory. By law BellSouth is not currently allowed to impose the late payment charge therefore complaints are not likely. Without waiving its objections, one or more persons may have inquired about or complained about the proposed tariff or a prior proposed tariff. All complaints are public documents at the TRA or if relevant the Division of Consumer Affairs. The Consumer Advocate Division objects to work product and invasions of Tenn. Code Ann. § 10-7-504 (a)(5) privileges.

31. Does the CAD contend that BellSouth provides annual discounts to customers who pay for local service in advance? If so, please set forth in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. For some of its privileged business customers, BellSouth provides annual discounts through special contracts. Nearly all of BellSouth customers are also billed in advance of BellSouth providing local service.

32. Please identify each and every person who provides answers to or otherwise participates

in responding to each of these Data Requests.

Response: Archie Hickerson, Robert T. Buckner, Michael Chrysler, BellSouth, L. Vincent Williams.

33. Please produce any and all criticism(s) and comments of any and all studies of customer payment patterns in the CAD's possession or of which the CAD has knowledge.

Response:

34. Please admit that there is statutory authority for the Tennessee Regulatory Authority to approve a BellSouth tariff imposing a charge for late payments.

Response: Denied with respect to the tariff at issue.

35. Does the CAD contend that the fact that BellSouth did not seek any rate adjustments during the proceedings addressing its application for price regulation estops BellSouth from implementing its proposed late payment tariff? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. Prior to filing its application, BellSouth knew or should have known that its discretion regarding basic local exchange service rates and charges would be limited under Tenn. Code Ann. § 65-5-208 (a). It was therefore placed on notice by the words of the statute. During the Tenn. Code Ann. § 65-5-209 proceeding BellSouth knew or should have known that its rates at the time its application would be approved could be deemed just and reasonable as a matter of law and shall be maintained and that deviations from those rates could be unreasonable or exceed the maximum. BellSouth knew or should have known that cross-subsidies or tying residential and business basic rates to non-basic business rate decreases would be prohibited. BellSouth knew or should have known that its revenues will be considered under Tenn. Code Ann. § 65-5-207 and that basic local exchange service rates need not increase for any reason. BellSouth knew or should have known that preferences to its competitive services will be prohibited under Tenn. Code Ann. § 65-5-208 (c).

36. Please admit that BellSouth incurs costs in attempting to collect late payments.

Response: Denied. See the answer to number 13.

37. Does the CAD contend that BellSouth's late payment charge is unjustly, unreasonably, or unduly preferential or discriminatory? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. See response to No. 31.

38. With reference to Issue No. 2 as set forth in BellSouth's March 22, 2000 letter to Mr. David Waddell, does the CAD contend that BellSouth's billing agreements with other telecommunications companies do not allow BellSouth to charge its proposed late payment charge to the consumer, in the event a consumer pays the bill late? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. Consumers are not BellSouth's actual customers under the billing agreements with other companies. The other company is BellSouth's customer. Any late payments must arise if at all, as payments to those companies the consumer contracted with to pay that company's late charge.

39. With reference to Issue No. 2 as set forth in BellSouth's March 22, 2000 letter to Mr. David Waddell, does the CAD contend that BellSouth's billing agreement with other telecommunications companies prohibit BellSouth from charging its proposed late payment charge to the consumer, in the event a consumer pays the bill late? If so, please explain in detail the factual and legal basis for your contention, identify all facts supporting your contention, and produce all documents supporting your contention.

Response: Yes. See response above.

Respectfully submitted,



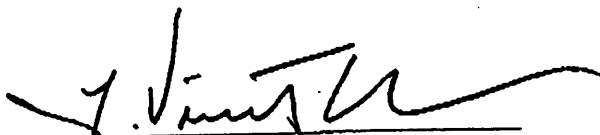
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Response has been mailed postage prepaid to the parties listed below this 6th day of April, 2000.

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